IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL WRIT PETITION NO. 8 OF 2003.

Shri Agnelo Castelino,
Director, M/s. R.C. Coastal
Exports P. Ltd., 606,
Garden Resorts, Sion Bombay Road,
Chembur, Mumbai. ... Petitioner.

Versus

1. M/s. Atreya Shipping P. Ltd.,
   represented by its Director,
   Shri Prabhakar Narayan Sawant,
   Office at 204, Damodar Chambers,
   Opp. Syndicate Bank,
   Vasco-da-Gama
2. State through Public Prosecutor. ... Respondents.

Mr. Edwin Furtado, Advocate for the Petitioner.

Mr. S.G. Bhobe, Advocate for the Respondent No. 1.

Coram : P.V. HARDAS, J.

Date : 10th April 2003.

ORAL JUDGMENT.

By consent of parties, this Criminal Writ Petition is being disposed off finally at the stage of admission.

2. This is a petition filed under Section 482 of the Code of Criminal Procedure and Article 226 of the Constitution of India by the unsuccessful petitioner/accused, whose application for recall of process was rejected by the learned trial Court and the Order of the learned trial Court was confirmed by the learned revisional Court.

3. Criminal Case No. 117/N/2001/A came to be filed in the Court of the Judicial Magistrate, First Class, Vasco-da-Gama, by the respondent no. 1/complainant in respect of the bouncing of cheque issued by the petitioner, dated 23rd January 2001, for an amount of Rs. 17,81,760/-, drawn on the HDFC Bank, Fort, Mumbai. The said cheque was returned unpaid on account of "funds insufficient", by a memorandum, dated 23rd January 2001, issued by the HDFC Bank, Vasco-da-Gama, that is, the bank of the complainant.

4. The two points which have been raised and answered against the present petitioner by the two Courts below are raised in the present petition. The learned counsel for the petitioner has urged before me that (1) there was no material before the learned trial Court to come to the conclusion that the said cheque had been returned unpaid for 'insufficiency of funds' by the bank of the accused; (2) the memorandum, dated 23rd July 2001, issued by the HDFC Bank, Vasco-da-Gama, does not contain any reference to any memorandum issued by the bank of the accused intimating the bouncing of the cheque for 'insufficiency of funds'; (3) the statement of account, which was produced by the accused before the learned trial Court in support of his application for recall of process, does not show that any amount has been debited to the account of the

accused because of the bouncing of the cheque; and (4) the cheque, which admittedly bears the date 23rd January 2001, was presented to the bank of the complainant by the complainant beyond the valid period of six months.

5. On the above grounds, it is urged before me that the prosecution under Section 138 of the Negotiable Instruments Act pending before the learned Judicial Magistrate, First Class, Vasco-da-Gama, be quashed. The learned counsel for the petitioner has placed strong reliance on the Judgment of the Supreme Court in **Shri Ishar Alloy Steels Ltd. v. Jayaswals Neco Ltd.,** (2001) 3 S.C.C. 609.

6. On notice being issued, the original complainant is represented by Mr. Bhobe. Mr. Bhobe, the learned counsel appearing on behalf of the respondent/complainant states that the memorandum issued by the complainant's bank refers to the cheque being returned unpaid on account of 'insufficiency of funds'. According to him, obviously, the bank of the complainant is incompetent to return the cheque unpaid on account of 'insufficiency of funds'. Thus, according to him, the bank of the complainant must have presented the cheque to the bank of the accused and on such basis the said memorandum came to be issued. Though the complainant has not received any memorandum from the bank of the

accused, the memorandum in respect of the bouncing of the cheque issued by the complainant's bank is clear in its contents that the cheque has been returned for 'insufficiency of funds'. Moreover, according to the learned counsel for the respondent, it is a matter of evidence and such a plea cannot be decided at this stage in the absence of any unimpeachable document to indicate as a fact that the said cheque had not been presented to the bank of the accused. (Emphasis supplied). He has also urged before me that the said cheque was dated 23rd January 2001, which was presented to the bank well within the valid period of six months. The memorandum does not indicate that the cheque had been returned unpaid on account of the fact that the cheque had been presented beyond the validity period of six months.

7. The petitioner has annexed a certified copy of the cheque, which was Exhibited as P.W.1/A Colly before the learned trial Court during the recording of the verification statement. The petitioner has also annexed the memorandum, dated 23rd July 2001, issued by the bank of the complainant, which is at Exhibit P.W.1/A Colly. The petitioner has also produced and annexed as a document, the statement of account maintained at the HDFC Bank, Mumbai.

8. Two Courts below have concurrently held

against the present petitioner/accused and, therefore, he has invoked the inherent powers under Section 482 of the Code of Criminal Procedure and the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India. It is a settled position of law that invoking the jurisdiction of this Court under Section 482 of the Code of Criminal Procedure or Article 226 of the Constitution of India for challenging the concurrent finding of fact is to be exercised by this Court sparingly and in rarest of rare cases as held by the Supreme Court in **State of Haryana and others v. Ch. Bhajan Lal and others,** 1992 CRI.L.J. 527. A reference may usefully be made to the Judgment of the Bombay High Court in **Jacob Harold Aranha and another v. Mrs. Vera Aranha and another,** 1979 CRI.L.J. 974, where the Bombay High Court has held that inherent powers should be exercised sparingly with circumspection and in rare cases and that too to correct patent illegalities.

9. In the present case a perusal of the memorandum issued by the bank of the complainant would reveal that the said cheque was returned unpaid on account of "funds insufficient". It is true that for reasons, which are not discernible from the record, the memorandum in respect of return of cheque is not accompanied by a memorandum of the bank of the accused. It is also a fact that in the complaint, which was filed

before the Magistrate, the complainant at paragraph 2 has stated:-

> "2. The complainant says that soon after the receipt of the said cheque, on presenting it for its realization with the Vasco-da-Gama, Goa Branch, of HDFC Bank Ltd., it was dishonoured for want of sufficient funds to the account of the accused."

It is true that in the said paragraph it is not expressly stated by the complainant that the cheque was dishonoured by the bank of the accused though the complainant states that he had presented the cheque for realization with the Vasco-da-Gama Branch of the HDFC Bank and it was dishonoured on account of insufficient funds to the account of the accused. Merely on the basis of the memorandum issued by the bank of the complainant, it cannot be presumed, at this stage, in the absence of unimpeachable material, that the cheque was never presented by the complainant's bank to the bank of the accused. It is a common banking practice that the drawee bank would not dishonour the cheque unless the same was presented to the drawer bank. Be that as it may, according to me, this is a highly contentious issue, which can only be addressed by the Court, after the parties lead evidence in this behalf. It cannot be said that the material before the learned Magistrate was insufficient for issuance of process against the petitioner/accused.

10. The Supreme Court in Shri Ishar Alloy Steels Ltd. v. Jayaswals Neco Ltd., has held in order to attract the criminal liability of the drawer the cheque must be presented to the drawee bank within the statutory period either personally or through a collecting bank.

11. Turning to the other ground urged by the learned counsel for the petitioner that the cheque has not been presented within six months to the bank, the memorandum or the reason for the bouncing of the said cheque speaks for itself. In the case before the Supreme Court, the said cheque had been returned by memorandum of the drawer bank with a remark that the said cheque had been presented beyond the period of six months. In the present case, the memorandum of the complainant's bank is self speaking. The said cheque has been returned on account of insufficiency of funds and not on account of the fact that the cheque was presented beyond the period of six months.

12. In my considered opinion, these are all matters which are required to be dealt with by the Court after evidence is recorded. The petitioner has placed heavy reliance on the statement of account which he has produced and on a query which was made by the Court to the learned counsel for the petitioner whether the

petitioner/accused on the date of presentation of the cheque had the requisite amount in his account to cover the amount of the cheque, the answer was in the negative. In my considered opinion, therefore, the petitioner has not been able to make out any case for quashing the prosecution under Section 138 of the Negotiable Instruments Act.

13. In view of the above, Criminal Writ Petition is dismissed with no order as to costs.

(P.V. HARDAS)
JUDGE.

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